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No. 90.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1923.

BOARD OF TRADE OF THE CITY OF CHICAGO, ARMOUR GRAIN COMPANY, GEORGE A. HELLMAN, et al.,
Petitioners,
vs.
E. H. JOHNSON, Trustee in Bankruptcy of Wilson F. Henderson,
Respondent.

Certiorari to the Circuit Court of Appeals of the Seventh Circuit.

BRIEF FOR PETITIONERS.

HENRY S. ROBBINS,
Counsel for Petitioners.

BARNARD & MILLER PRINT, CHICAGO.

SUBJECT INDEX.

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CITATIONS.

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QUESTIONS PRESENTED.

This record presents two questions:

(1) Of jurisdiction—does this record disclose a "proceeding in bankruptcy" or a plenary suit, of which the District Court had no jurisdiction, "unless by consent of the proposed defendant."

(2) Does the Bankruptcy Law annul the rules of the Chicago Board of Trade so far as they provide for the suspension of a bankrupt member—and prevent a sale of the bankrupt's membership—until his debts to other members are paid.

STATEMENT.

On the 10th of June, 1920, respondent, as the trustee in bankruptcy of Wilson F. Henderson a member of the Chicago Board of Trade, filed in this bankruptcy pro-

ceeding, a petition to have Henderson's membersh transferred to such trustee free and clear of any clai of this exchange or its members.

The respondents to this petition are the Board Trade of the City of Chicago (hereinafter called "Board of Trade"), and also Armour Grain Compa George A. Hellman, and George S. Bridge and John Leonard, partners as Bridge & Leonard, James E. B nett, Frank J. Saibert, Frank F. Thompson and Fra A. Miller, partners as James E. Bennett & Co., (all whom enjoy the privileges of membership in the Boa of Trade) hereinafter called the "co-petitioners."

These respondents (petitioners here), filed pleas to jurisdiction of the District Court claiming that the pe tion presented a "controversy in bankruptcy," as d tinguished from a "proceeding in bankruptcy." The pleas (in conjunction with the petition) averred the f lowing facts:

The Board of Trade maintains in Chicago a grain change under a special charter granted by the State Illinois, by which it was given the right to admit or pel "such persons as it may see fit in the manner to prescribed by its rules, regulations and by-laws," a also the power to maintain such rules, regulations a by-laws for the management of the business of its me bers, "and the mode in which it shall be transacted" the Board of Trade might think proper. (Rec., 14.)

Pursuant to this charter it has provided by ru (Rec., 9) that no person shall be admitted to memb ship unless his application shall have been approved at least ten of its eighteen directors. In lieu of the p ment of an initiation fee of $25,000, an applicant m tender an unimpaired and unforfeited membership d transferred, and he must also sign an agreement with

Board of Trade to abide by its rules and all amendments thereto.

The Board of Trade has also provided by rule that any member may transfer his membership, provided he is not indebted to any other member and his membership is not in any way impaired or forfeited under its disciplinary power, and provided the person to whom said selling member desires to transfer his membership shall be approved for membership by its board of directors. (Rec., 9.)

Another rule provides that any member convicted of a failure to comply with *any* business obligation to any other member shall be suspended from all the privileges of the Board, until all his outstanding debts to *all* members shall have been settled. (Rec., 15.)

No corporation is admitted to membership, but the rules provide that, if two of the executive officers of a corporation are members in good standing, contracts may be made by the corporation on the exchange, but that, if such corporation shall fail to comply with its business obligations to members of the Board, all its officers, who are members of the Board, shall be subject to discipline to the same extent as upon a failure to comply with any business obligation of their own. (Rec., 10.)

In November, 1899, Wilson F. Henderson was elected a member and signed an agreement to abide by its rules; and at that time, all of the rules above mentioned were, and still are, in full force and effect.

For many months prior to March 1, 1919, Henderson was the president of Lipsey & Company, a corporation, which under the above rule was entitled to make contracts in its own name on the exchange. This corporation transacted business on the exchange until March, 1919, when it became insolvent, being then indebted to

said co-petitioners (who are, and then were, members of the Board of Trade) in sums aggregating $59,312. (Rec., 17.) All of this indebtedness is still unpaid and prevented under Rule X (Rec., 9) the transfer of Henderson's membership, and made Henderson under Section 7 of Rule IV (Rec., 15) subject to suspension until all these debts were paid.

On the 24th of January, 1920, and after Lipsey & Co. had become indebted as aforesaid, certain creditors of Henderson—who was a resident of Chicago—filed in the District Court at Chicago a petition to have him adjudged a bankrupt (Rec., 6); and on the 24th of February, 1920, he was so adjudged, and respondent Johnson was on April 1, 1920, appointed his trustee.

Five days after this petition in bankruptcy was filed the co-petitioners, being severally creditors of Lipsey & Company, filed with the Board of Trade their objections to the transfer of Henderson's membership (Rec., 21), by reason whereof its board of directors are debarred by the rules from sanctioning such transfer, or approving any person as a transferee of said membership, such membership has not been transferred, and Henderson still remains a member.

After the institution of these bankruptcy proceedings, Bridge & Leonard, two of the co-petitioners (and creditors of Lipsey & Company prior to the bankruptcy proceedings), instituted before the board of directors a proceeding, under the rule above mentioned, to have Henderson suspended from the Board of Trade by reason of the failure of Lipsey & Company to pay its said debt to Bridge & Leonard. This proceeding is still pending before the board of directors, by reason whereof the membership of Henderson is "impaired" within the meaning of Rule X. For this reason and because of the objections of co-petitioners to the transfer of the membership,

the pleas alleged that the Board of Trade is under its rules without power, and is unwilling, to transfer the membership of Henderson.

The District Court overruled these pleas; and petitioners, not waiving their objections to jurisdiction filed answers, in which they agai nset out the facts above mentioned. (Rec., 25, 30.)

Upon a final hearing upon the petition and answers (and without the introduction of any evidence) the District Court entered a decree (Rec., 31), that said membership had passed, and belonged, to said trustee *free and clear of any claims or objections of said co-petitioners*, and ordering said Board of Trade to refuse to recognize any of said claims as valid objections to the transfer of, or liens upon, said membership as against said trustee, and to ignore the proceedings of Bridge & Leonard for the suspension of said Henderson, and to enter upon the records of said Board of Trade said respondent, as the owner of said membership, but for the purpose of sale only.

Petitioners then filed in the Circuit Court of Appeals their petition to review and revise this decree, and also perfected their appeal from said decree; and in that court this petition and appeal were consolidated.

On the 13th of May, 1922, the Circuit Court of Appeals affirmed the decree of the District Court, (see opinion, Rec., 68) and this case is here on certiorari.

The Errors Relied Upon.

1. That the District Court erred in not dismissing the petition for want of jurisdiction.

2. That the District Court erred in not dismissing the petition for want of merit.

ARGUMENT.

I.

QUESTIONS OF JURISDICTION.

The opinion of the Circuit Court of Appeals says that "the record and undenied statements in open court show that at the time the bankruptcy proceedings were commenced * * * Henderson was a citizen of the State of Florida."

There is nothing in the record to support this statement. On the contrary, the verified creditors' petition to have Henderson adjudged a bankrupt (Rec., 6) expressly states that Henderson was a resident of Chicago, and if he had been a resident of Florida, the District Court for the Illinois district would have been without jurisdiction to adjudge him a bankrupt, and it would have been the duty of the Circuit Court of Appeals of its own motion to have directed the dismissal, not only of the petition involved in this record, but the entire bankruptcy proceeding. Furthermore, that court was not warranted in accepting, in lieu of the plain statements of the record, "undenied statements made in open court" by respondent's counsel.

Jurisdiction in the District Court, therefore, could not be sustained within the exception in Section 23-b of the Bankruptcy Act, which permits suits by the trustee in the courts where the bankrupt might have brought them, had proceedings in bankruptcy not intervened.

The Circuit Court of Appeals did not itself rely upon this basis for jurisdiction; for it proceeded to uphold the

jurisdiction of the District Court upon the ground that neither the Board of Trade nor its co-petitioners here were "adverse claimants" within the jurisdictional provisions of the Bankruptcy Act.

In disposing of this question of jurisdiction, the question is not, whether the claimants are on the right or wrong side of the controversy, but only whether there is a real controversy. The Circuit Court of Appeals seems to have ignored this and to have overruled the plea because the court was against the petitioners on the merits.

Under any bankruptcy law, there is a natural and proper distinction to be drawn between the *proceeding in bankruptcy* "initiated by the petition and ending in the distribution of the assets among the creditors and the discharge, or refusal of a discharge, of the bankrupt," and a *suit to determine a controversy* between a trustee in bankruptcy and a claimant of an adverse interest.

This distinction arises out of the necessity for a reasonably expeditious administration of a bankrupt's estate, which is not possible, if the parties to all controversies arising out of bankruptcy proceedings enjoy all the rights to litigate, which are accorded to ordinary litigants.

Thus, a bankruptcy court must, so far as feasible, be given the right to decide questions in a summary way—by a summary petition and notice—instead of by bill in equity or action at law. So, too, the right to have a case reviewed by appeal must necessarily be much abridged.

They who benefit from the bankruptcy law—the individual bankrupt and his creditors—may reasonably be deprived of the full right to litigate. For they are interested in, and compensated by, the speedier administration of the bankrupt's estate.

But there can be no reason, why a *stranger* to the bankruptcy proceedings—one who does not claim or benefit under it—should have his right to litigate curtailed. It is doubtless these considerations that have given rise to the distinction above mentioned.

The bankruptcy law of 1867 observed this distinction. The District Courts were given jurisdiction to proceed in a summary way in the disposal of all those controversies that arose out of the administration of the estate —mainly questions which concerned only the bankrupt and his creditors.

In this class of cases, the Circuit Courts were given by the laws of 1867, jurisdiction to exercise a general supervision over the District Courts, but no appeal from the Circuit Courts to the Supreme Court was given.

That statute also gave both the Circuit and District Courts jurisdiction of suits brought by an assignee in bankruptcy "against any person claiming an adverse interest," as well as of suits by such claimant against such assignee, and in this class of cases the same right of appeal was accorded as existed in other cases.

In other words, where only those benefiting by the bankruptcy law were interested—the proceeding was summary and the appeal limited; and where the rights of adverse claimants who were strangers to the bankruptcy proceedings were involved—the controversy took the form of a suit at law or in equity, and a full right of appeal was given.

Smith v. *Mason*, 14 Wall, 419.
Marshall v. *Knox*, 16 Wall 551.

The same distinction was carried into the present bankruptcy law.

First National Bank v. *Title and Trust Company*, 198 U. S. 280-9.

Sub-clause (7) of Section 2 confers on the District Courts jurisdiction at law and in equity to "cause the estates of bankrupts to be collected * * * and to determine controversies in relation thereto, except as *herein otherwise provided.*" And this exception refers to sub-clause "b" of Section 23, reading as follows:

> "Suits *by* the trustee shall only be brought * * * in the courts where the bankrupt * * * might have brought * * * them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant."

The present law draws a distinction between "controversies at law and in equity" and "proceedings in bankruptcy," and District Courts are given full jurisdiction as courts of bankruptcy of all controversies which concern the administration of the estate and affect only those benefiting by the bankruptcy law—bankrupts and their creditors—and this jurisdiction is exercised in a summary proceeding and without trial by jury. The only right to review in such cases is by petition in Circuit Courts of Appeals and this *is limited to questions of law.*

The language used in the 1867 law was "suits at law or in equity" brought by the assignee in bankruptcy "against any person claiming an adverse interest," or "by such claimant against such trustee;" while sub-clause "b," Section 23 of the present bankruptcy law reads, "suits *by* a trustee shall only be brought," etc. But the preceding sub-clause "a" of Section 23 refers to "controversies at law and in equity" * * * between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees."

Thus the words "suits by the trustee" in Section "b," should be construed as meaning suits by the trustee against a *person claiming an adverse interest,* and in this

respect the provision of the 1867 Act and the present la must be regarded as identical.

Under the general principle that gives to a court juri diction of all controversies respecting property with its possession and control, the bankruptcy courts ha also jurisdiction of plenary suits which any adver claimant finds it necessary to bring against a trustee as well as of all such suits as a trustee finds it necess to institute against adverse claimants—*relating to t property of the bankrupt within the control of the cou or its officers.*

If, therefore, the proceeding at bar is, within the di tinction above indicated, a "controversy in bankruptcy and the trustee had not acquired possession or contr of the membership, the District Court was without juri diction to decide the controversy, and did not acqui jurisdiction because such respondents subsequently a swered to the merits.

First Natl. Bank v. *Title & Trust Co.*, 198 U. 280.

Bardes v. *Hawarden Bank*, 178 U. S. 524.

These decisions conform to sub-clause "a" of Secti 23 of the present law, which prevents plenary suits f "controversies, * * * between trustees as such and a verse claimants concerning the property acquired claimed by the trustees." This membership is such pro erty.

Thus jurisdiction here depends on (1) whether th proceeding by the trustee is a "controversy in ban ruptcy," and if so, (2) whether the District Court throu the trustee had acquired possession of this membersh

First. The Circuit Court of Appeals decided th neither the Board of Trade nor the co-petitioners (all whom are strangers to the bankruptcy proceeding) a

to be regarded as adverse claimants, although they claim, as does the trustee, what this court has decided to be property subject to taxation. *Anderson* v. *Durr*, 257 U. S.99.)

To reach this result that court confines adverse claimants to those "who (1) have possession of the property, claiming ownership thereof or a lien thereon, or (2) who deny owing any money claimed by the trustee."

There is no valid reason, and no authority, for thus limiting the character of adverse claimants, or thereby excluding petitioners from that category.

The decision of this question of jurisdiction cannot be made to depend upon the particular kind of right asserted. In no branch of the law protecting property is there a distinction made between rights to tangible property and choses in action or other rights which are intangible.

No reason exists for holding to be an adverse claimant one, who happens to be the owner of property susceptible of possession, or one indebted to the bankrupt on a money demand, and denying the same character to one who has or asserts a right which relates—as here—to intangible property.

An adverse claimant is anyone who claims adversely to another some right which the law recognizes and will protect. Where—as here—a trustee seeks to defeat a contract between a bankrupt and a stranger to the bankruptcy proceedings, or where the trustee is attempting to defeat a right under a charter from a state claimed by such stranger to the bankruptcy proceeding, the latter is an adverse claimant, especially where the right claimed relates to or affects what this court has held to be valuable property.

The decisions sustain this construction of the Bank-

ruptcy Act. Thus while one who holds property as agent or officer of the bankrupt and makes no personal claim upon it, or a receiver or an assignee for the general benefit of creditors (when he is claiming nothing for himself), is not an adverse claimant.

Mueller v. *Nugent*, 184 U. S. 1.
Babbitt v. *Dutcher*, 216 U. S. 102.
Bryan v. *Bernheimer*, 181 U. S. 188.

Such an assignee is an adverse claimant when there is a controversy respecting his fees or expenses.

Galbraith v. *Vallely*, 256 U. S. 46.
Louisville Trust Company v. *Comingor*, 184 U. S. 18.

The cases make no distinction in the nature of the adverse claim. A real claim of any right which the law recognizes and will enforce makes one an adverse claimant.

The claim need not be to tangible property nor to property within the claimant's control or possession. One who claims a debt due from a third person, which debt is also claimed by the trustee, is an adverse claimant.

Smith v. *Mason*, 14 Wallace 419.

A creditor who has levied on property of his debtor (subsequently a bankrupt) and caused a receiver to be appointed by a state court before the bankruptcy proceedings, is an adverse claimant.

Martin v. *Oliver*, 260 Fed. 89.

Where one bank claims a lien on securities held in the possession of another bank to secure a debt of one subsequently becoming a bankrupt, the former bank is an adverse claimant.

In re Bacon, 210 Fed. 129 (C. C. A., 2d. Cir.).

Where a contractor, who subsequently became bankrupt had a contract with the city, and one furnishing material to the contractor had by statutory notice secured a lien on the money due the contractor from the city, such materialman was an adverse claimant within the bankruptcy law.

In re Cotton, 209 Fed. 124.

Where an assignment is made, not for the benefit of creditors generally, but to secure certain creditors, they are adverse claimants under the bankruptcy law.

In re McCrum, 214 Fed. 207 (C. C. A., 2d Cir.).

A creditor who claims under a lien any of the property of a bankrupt in the hands of a sheriff or other person, is an adverse claimant.

Marshall v. *Knox*, 16 Wall. 551.

First Nat. Bank v. *Title & Trust Co.*, 198 U. S. 280.

In the latter case, the Supreme Court again asserted that the principle requiring a plenary suit is applicable "whether absolute title or only a lien is claimed."

See also *In re Rathman*, 183 Fed. 913 (C. C. A., 8th Cir.).

Within the principle as thus properly defined, the Board of Trade is an adverse claimant. Under its charter it has the right to provide that no corporation should transact business on its exchange unless the officers of that corporation are subject to the same liability for the debts of the corporation to other members as for their own debts to other members.

It also has the right to provide for the suspension of a member—or to refuse to transfer his membership—until all his debts to other members are paid. This is but a part of its disciplinary power over its members.

The Illinois courts have many times upheld, and many times refused to interfere with, the exercising of this disciplinary power. It also has the right to provide that no one shall become a member unless he agrees to these provisions.

Henderson the bankrupt, to become a member of the Board, agreed to abide by these rules. Thus, his membership is based upon a contract, whose provisions are as binding upon the trustee as upon the bankrupt.

Henderson, as the principal officer of a corporation, transacted business on the Board of Trade in its name. The corporation thus became indebted to sundry other members of the Board of Trade in sums aggregating over $65,000.

This has resulted in a controversy between the Board of Trade, a stranger to the bankruptcy proceeding on the one side, and the trustee in bankruptcy on the other. The Board of Trade asserts, and the trustee denies, the continuance of its disciplinary power *after* the institution of bankruptcy proceedings. The trustee claims, and the lower court held, that as soon as bankruptcy proceedings are instituted against a member all the rules of the Board of Trade become inactive, so far as they affect the value of the membership of the bankrupt; that Henderson's membership is an asset in bankruptcy, the proceeds of which should be applied to the general creditors of the estate. The Board of Trade denies these claims and contends that the bankrupt is still subject to suspension for the failure of his corporation to pay its debts, and that these debts are, under the rules of the Board of Trade obstacles to the transfer of the membership, and that the trustee is seeking to annul, and the District Court has annulled, the contract under which this bankrupt became a member.

In other words, the Board of Trade is claiming under a legal right arising out of a charter granted by the State of Illinois and a contract with Henderson, and the trustee is denying that right, and claims that it is eliminated by, or subordinated to, the Bankruptcy Law.

On what theory can it be claimed that this does not present a controversy, and a substantial and bona fide controversy, between the trustee and a stranger to the bankruptcy proceeding who is an adverse claimant within the meaning of the Bankruptcy Act?

But the Board of Trade is not the only claimant. The trustee also made defendants to his petition the co-petitioners (members of the Board of Trade) who have unpaid claims against Lipsey & Company, Henderson's corporation, and the petition prayed for, and the District Court granted, relief against these claimants.

All of them claim that, under the rules of the Board of Trade, Henderson's membership could not be transferred until their claims against Lipsey & Company were paid or satisfactorily settled. Co-petitioners Bridge & Leonard also claim the right to have the Board of Trade suspend Henderson until Lipsey & Company's debt to them was paid.

The debts of Lipsey & Company were valid liens upon the membership for sums which in the aggregate far exceed its value ($10,000). For a lien often arises out of a mere right to *withhold* property from the owner until he pays a debt. Certain common law liens do not include a power of sale. (25 Cyc., 662, 680, 19 Halsbury's Laws of England 25.) The rules of the Board of Trade enabled these co-petitioners to prevent Henderson and his assigns from realizing by a sale of the membership without first paying or settling co-petitioners' claims. Hence, these petitioners who have

claims against Lipsey & Company are claiming rights in the nature of liens on the membership of the bankrupt to secure amounts far in excess of the value of the membership, and are adverse claimants. In other words this case in this respect is not to be distinguished from—

Marshall v. *Knox*, 16 Wallace 551.

First National Bank v. *Title & Trust Co.*, 198 U. S. 280.

In re McCrum, 214 Fed. 207, 211 (C. C. A., 2d Cir.).

In the First National Bank case a storage company claimed certain property as against the trustee in bankruptcy, because it had issued therefor certain warehouse receipts. Here the Board of Trade asserts the right to withhold the transfer of the membership to the trustee because of certain of its rules and its implied contracts with its members. In the First National Bank case the holders of the warehouse receipts claimed liens upon the property. In the case at bar co-petitioners claim liens upon the membership. In both cases the claims of the corporations, as well as the claims of those asserting liens, were *bona fide* and substantial. In the First National Bank case this court decided that the Circuit Court of Appeals had erred upon the question of jurisdiction.

Second—Is the trustee or the District Court in possession or control of this membership?

It is represented by no certificate or other document.

It is not susceptible of sale in the sense that other property is. Money can be realized from a transfer only because one accepted as a member of the Board of Trade may tender an existing membership in lieu of the initiation fee of $25,000. This requires that the board of directors must accept as a member the person who thus tenders the membership and sanction the transfer

of the membership tendered. Before doing so, the Board must post the membership for transfer and thus determine whether it is in a condition to be transferred. If the Board refuses to sanction the transfer or to accept the membership tendered in lieu of an initiation fee, the only way in which it can be compelled to do so is by judgment of a court behind which is the authority of the state or nation. How can something that the trustee is powerless to transfer or sell without either the concurrence of the Board of Trade or, in its absence, the judgment of a court be said to be in the possession or control of such trustee or the District Court?

If the Board were merely passive and indifferent because having no interest or right of its own to protect, and were willing to make a transfer whenever requested by the trustee and the bankrupt, it might perhaps be said that the Board occupied a position similar to that of an agent, or receiver, or assignee for the benefit of creditors, and therefore was not one in possession adverse to the trustee.

But here the Board has a distinct and personal interest under the contract by which the bankrupt became a member. It is claiming adversely to the trustee and refuses to take any of the steps by which alone the membership can be transferred. It is in complete control of the membership and cannot be divested of that control except by judicial order.

Indeed, it is difficult to see how possession can be predicated upon a mere chose in action or other intangible right.

The trustee perhaps may be said to be in constructive possession of a chose in action when the other party thereto recognizes the trustee's right and holds for his benefit.

But how can this be when such party denies any right of the trustee and refuses to hold for his benefit, or to accept any orders from him for the payment, delivery or transfer of the chose in action?

Moreover, the rule under consideration does not include constructive possession at all. If it did, a trustee could sue any debtor of the bankrupt in the District Court on the ground that the court was in constructive possession of the debt, which would nullify the explicit provision of the statute that the trustee may not sue an adverse claimant in the District Court without the latter's consent. As stated by the Circuit Court of Appeals of the Eighth Circuit in *Re Rathman*, 183 Fed. 913-926, "the actual possession by the bankruptcy court is the indispensable condition of its exclusive and of its summary jurisdiction here."

The Circuit Court of Appeals, therefore, properly ignored the contention of counsel for respondent—which will be renewed in this court—that the membership passed into the *constructive* possession of the trustee by reason of the adjudication in bankruptcy.

In *O'Dell* v. *Boyden*, 150 Fed. 731, which counsel cite in support of this contention, a member of the New York Stock Exchange became a bankrupt and under the order of the bankruptcy court requested the Exchange to sell his membership; and the Exchange sanctioned the transfer of the membership to one whom the Exchange accepted as a member, and the proceeds of such sale were held by officials of the Exchange awaiting distribution pursuant to its rules, which gave priority in such distribution to its own members. The Exchange itself made no claim to any of the money. The right of creditor members to priority of distribution was conceded. The controversy related only to the residue of the proceeds

after the payments to the Exchange members. After the sale a claimant appeared for this residue, and the only controversy was between the trustee and this claimant. Neither the Exchange nor its creditor members were in any sense adverse claimants. Before the appearance of this claimant the Exchange had, in fact, accepted the position of agent or bailee for the trustee, and thus under *Bryan* v. *Bernheimer*, 181 U. S. 188, the Exchange was in no sense an adverse claimant. The validity of its rules was not questioned, and its position was entirely different from that of the Board of Trade in the case at bar.

We, therefore, insist that these petitioners were adverse claimants of an interest in this exchange membership, that the controversy respecting it constituted a plenary suit; that the District Court had in no way acquired actual possession of the membership; that, respondents below not consenting, the District Court was without jurisdiction, and that this court should direct the dismissal for want of jurisdiction in the District Court.

II.

THE MERITS.

The Circuit Court of Appeals erred on the merits in the following respects:

(1) In holding that the right of the Board of Trade under its rules to suspend a member—and to refuse to transfer his membership—until his debts to other members were paid, ceased upon the appointment of a trustee in bankruptcy—even as respects debts which had accrued *before* the bankruptcy proceedings.

(2) In holding that this membership was an asset in bankruptcy.

(3) In construing the rule of the Board of Trade to mean that when an application for transfer of a membership had been posted and no objection was filed *within ten days* "the right to transfer became absolute without action by the board."

First. One reason given by the Circuit Court of Appeals for holding the first of the above propositions is, that upon being adjudged a bankrupt "Henderson ceased to be a member and was, of course, not thereafter subject to discipline by the Board," all his rights having passed to the trustee. In other words, upon an adjudication in bankruptcy title to the membership *ipso facto* passed to the trustee. This is in conflict with

Sparhawk v. *Yerkes*, 142 U. S. 1,

where this court held that the right of a trustee in bankruptcy of an exchange member, whose membership was incumbered by a rule of the exchange providing for his suspension until his debts to other members were paid—was only the right to *elect* within a reasonable time whether to take the membership or not, and that if such trustee should elect not to take, the membership remains the property of the bankrupt—thus placing the trustee, as respects a membership on an exchange, in the same position that he occupies respecting an unexpired leasehold.

This theory that the trustee has only the power to elect, at least where the membership is encumbered, is plainly the proper and practical one; for it permits the member to continue to earn his living after bankruptcy by acting as a broker or agent in exchange transactions, until and unless the bankruptcy court, to avoid incumbering the membership with new debts to other members, shall enjoin him from further trading.

If the membership is already incumbered by debts to

members beyond its value, so that the trustee should elect not to take it and pay the dues upon it, the bankrupt member may continue to earn a living upon the exchange so long as his exchange creditors indulge him, and this they frequently will do as the best way to enable him to ultimately pay or compromise his debts to them, and thereby become again a member in good standing as was the case in *Sparhawk* v. *Yerkes*.

Another reason given by the Circuit Court of Appeals for this first proposition is that such action by the Board of Trade under its rules, after the institution of bankruptcy proceedings "would merely destroy the sale value" of the membership which "the District Court had the power to prevent."

This is but another way of saying that the trustee takes the membership free from conditions which clog it as respects the member—a proposition which is at variance with several decisions of this court, which recognize and uphold the restrictions upon a membership which the rules of the exchange impose.

Hyde v. *Woods*, 94 U. S. 525,

where this court, in upholding a rule giving priority to exchange creditors, said:

> "A seat in this board is not a matter of absolute purchase. Though we have said it is property, it is incumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of Article 15, neither when Fenn bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come." And

Sparhawk v. *Yerkes*, 142 U. S. 1,

where this court again held a seat in a stock exchange to be "property, not absolute and unqualified, but limited and restricted by the rules of the association."

Page v. *Edmonds*, 187 U. S. 601.

The Circuit Court of Appeals decides that, as soon as bankruptcy proceedings are instituted against a member, the exchange at once loses all its disciplinary power over that member, and can neither expel him for misconduct, nor suspend him, or refuse to transfer his membership—because of his failure to pay his business obligations. That decision is not only in direct conflict with the decisions of this court in the above cases, but it is an impairment of the contract, which Henderson made in order to become a member.

No exchange can properly function unless all its members are at all times subject to its rules, including those giving the exchange the right to suspend or expel, whenever its rules contemplate such action.

The rules of the Board of Trade expressly authorize Bridge & Leonard to have Henderson suspended until all the debts of his corporation to other members of the Board were paid, and Henderson, to become a member, agreed that these rules might be made operative against him. Did the institution of bankruptcy proceedings absolve him and his trustee from this contract obligation?

In the *Sparhawk* case as well as in *Page* v. *Edmonds*, this court has upheld, as against a trustee in bankruptcy, exchange rules which automatically suspend an insolvent member, and provide that his debts to other members should be first paid, when the membership is sold; and no distinction is apparent between such a rule and one which, like the one at bar, makes such suspension discretionary with the board of directors of the exchange.

As there is nothing in the rule of the Board of Trade fixing a time limit, within which such charge shall be preferred or the suspension ordered—the rule being applicable to "any member,"—one is subject to suspension under this rule so long as he remains a member. If

a proceeding to suspend is commenced before the board of directors has sanctioned a sale of the membership, the membership becomes impaired under Rule X, hereafter mentioned, and the board of directors may not sanction the sale until the proceeding to suspend is disposed of, and, if the member is suspended, until he has adjusted his debts to other members.

What is here said respecting the rule providing for the suspension of a member is equally applicable to the rule preventing the transfer of a membership, when the member has any "outstanding unadjusted or unsettled claims or contracts held by members of this association."

The claims of the co-petitioners against Lipsey & Company were by the rule made such unadjusted claims against Henderson, and so long as they were unpaid the board of directors had no power under the rule to transfer the membership. Henderson had agreed to this, and he certainly is in no position to annul this contract by compelling the transfer of his membership without the payment of these obligations. On what theory can his trustee do so?

No citation of authority seems necessary upon the well settled principle that as respects equities and contracts the trustee stands in the shoes of the bankrupt, and may not sue or defend upon any ground not available to the bankrupt.

Second. Is this membership an asset in bankruptcy, as held by the Circuit Court of Appeals?

Section 70 of the Bankruptcy Law vests in the trustee all the property "which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

This membership could not have been levied upon and sold under judicial process against Henderson.

Barclay v. *Smith*, 107 Ill. 349.

Nor could it have been sold *by Henderson* prior to the filing of the petition in bankruptcy, because there were members of the Board having claims amounting to many times the value of the membership, who, under the rules were entitled to, and did, object to the transfer; and without the consent of *all* of them the board of directors is powerless to permit the transfer of the membership. Henderson could only make the membership transferable by satisfying these creditors, and the trustee—who stands in the bankrupt's shoes—cannot render it transferable, because the District Court would not permit him to expend enough money of the estate to satisfy these creditor-members.

It would, therefore, seem plain that under the wording of the Bankruptcy Law, a membership is not an asset in bankruptcy *when it is encumbered with the claims of creditor-members which exceed the saleable value of the membership.* And this for the reason that prior to the filing of a petition a member could not "in any sense have transferred" his membership. In the present case Henderson was not, when the petition was filed, in a position to transfer this membership and the Board of Trade was not then, and is not now, under its rules in a position to sanction such transfer.

When the rules of the Board are given their proper legal effect, the membership is valueless to the trustee in bankruptcy, because no order that the court can make respecting the sale of the membership could add one dollar to the bankrupt's estate. At best, the question respecting the title to the membership is as respects the trustee a mere academic one. In this view, too, the decree appealed from should be reversed.

An authority for this is,

In re Gregory, 174 Fed. 629 (C. C. A., 2d Cir.).

Again this case differs from those already cited, in which this court has held a membership on the exchange to be an asset in bankruptcy.

The State of Illinois, for the purpose of enlarging its intrastate commerce, has created and granted a special charter to the Board of Trade and thereby conferred on it the right to fix the conditions of membership. These so fixed are such that the Supreme Court of Illinois has likened a membership in the Board of Trade to a membership in a church, Masonic or Odd Fellow lodge, and for this reason has held it free from the claims of creditors.

People v. *Board of Trade*, 80 Ill. 134.

Under its charter power the Board of Trade has adopted rules under which neither the Board, nor members who are creditors of an insolvent member, may force the sale of his membership to pay his debts. Nor can an outside creditor of an insolvent member by legal process cause the sale of a membership. Those rules also provide that neither the member may sell nor the Board of Trade sanction the sale of, the membership, if a single other member, who is a creditor, objects.

In other words, a membership on the Board of Trade may be sold only when every creditor who is a member of the Board consents thereto. This is a part of the contract of membership, which is equally binding on the Board of Trade, the member and his trustee in bankruptcy.

These features are not present in the cases, in which this court has held (see cases already cited) that a membership in an exchange is an asset in bankruptcy. In each of the decisions of this court the rules of the ex-

change provided for the compulsory sale of a membership of an insolvent member and the application of the proceeds to the payment of creditors, who were members of the exchange. No such creditor could object to the transfer or the sale of the membership. Nor could the insolvent member.

In those cases a forced sale of the membership did not violate any rule of the exchange. The bankrupt could sell his membership despite any objection of the other members, and the exchange, as well as the bankruptcy court was in a position to compel him to do so. It was property, which the bankrupt prior to the filing of the petition in bankruptcy could have transferred.

This distinction in the elements constituting a membership in the Board of Trade and those constituting a membership of the exchanges involved in the previous decisions of this court justifies the contention that, despite those decisions, a membership in this Board of Trade is not an asset in bankruptcy, even if it were not encumbered with the debts of other members. *It is not, however, our purpose to present this question at this time, as the membership in the case at bar is encumbered beyond its value, and this seems amply sufficient to justify a reversal.*

Third. The Circuit Court of Appeals misconstrued the rule of the Board of Trade in holding that, when an application for transfer had been passed and no objection had been filed *within ten days,* "the right to transfer became absolute without action by the Board."

Rule X (Rec., 10) provides (Section 1) that one may become a member only after ten days' notice of such application has been posted on the bulletin of the exchange, and upon the approval of at least ten of the eighteen directors, and that

"Every member shall be entitled to transfer his membership when he * * * has against him no outstanding * * * claims or contracts held by members of this Association, and said membership is not in any way impaired or forfeited * * * *to any person eligible to membership who may be approved for membership by the Board of Directors,* after due notice by posting, as provided in Section 1 of this rule. * * * Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the exchange for *at least* ten days, when, if no objection is made, it shall be assumed the member has no outstanding claims against him."

Thus as a prerequisite to the transfer of a membership, a member desiring to transfer his membership must produce a person willing to purchase, and the name of such person must be posted on the bulletin board of the exchange for ten days, and thereafter such applicant must be approved for membership by the board of directors. The board of directors may not, under this rule, approve the transfer, if the membership is impaired by the pendency of, or suspension in, disciplinary proceedings.

Thus what operates to transfer the membership is the action of the board of directors in accepting the new member.

The Circuit Court of Appeals, therefore, misconstrued the rule in holding, as it did, that by reason of the failure of creditors to object within ten days "the right to transfer becomes absolute without action by the board," and that thereafter the selling member ceases to be a member or subject to discipline.

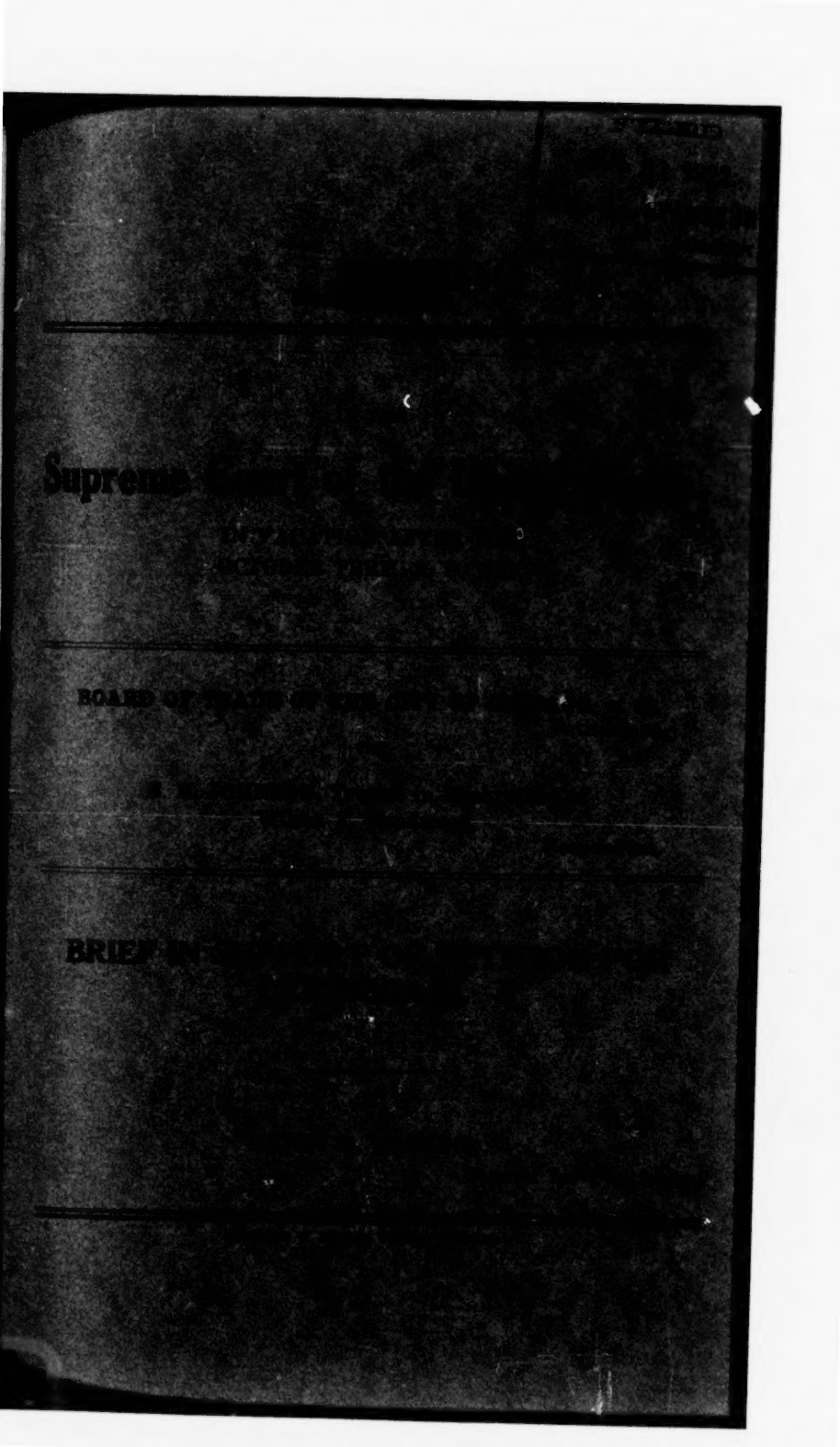
The rule will bear no such construction. It requires that the application for transfer shall be posted for "*at least* ten days *when*, if no objection is made, it shall be assumed the member has no outstanding claims against

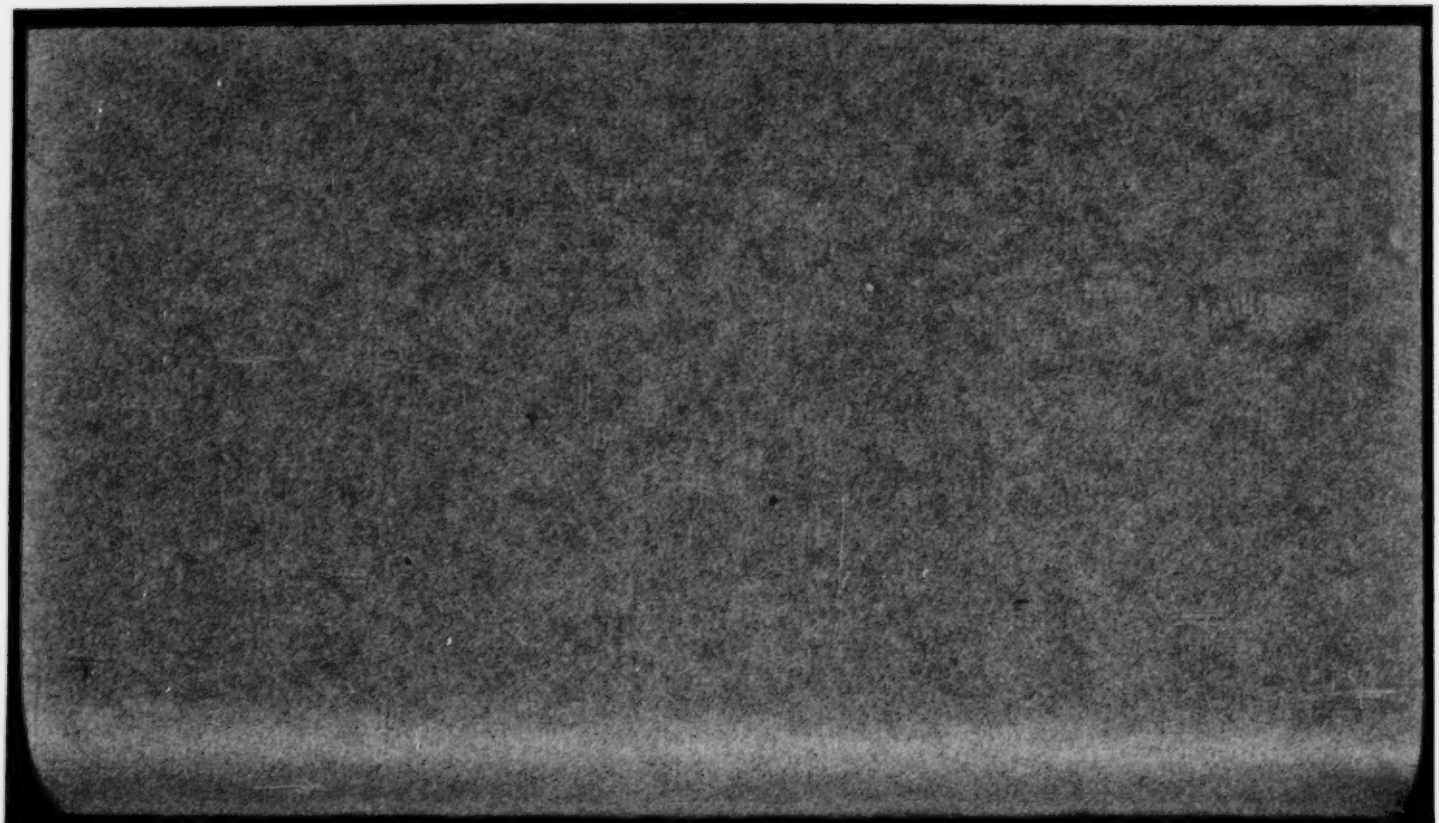
him." This merely provides that there must be a posting for at least ten days before the board of directors may approve the transfer. The application must be posted on the bulletin and remain there at least ten days, but the board of directors, by not then acting, may prolong the period for posting. It remains posted there until it is acted upon by the board of directors. Any member, having an outstanding claim against the member may object to the transfer at any time while the application is thus posted; that is, before the board of directors shall approve the transfer. The "when" in the last clause refers not to ten days, but to the period of posting. This is necessarily so, because when the board of directors acts it must first find that the selling member *has*—that is, at that time—against him no outstanding claim held by a member.

There is nothing in the rules of this exchange to embarrass a trustee of a bankrupt member in the administration of the estate. While the rules do not provide that exchange creditors of a member may *compel* him to sell his membership to pay them, they do contemplate that a member may request and secure the sale of his membership, if he pays his debts to other members, or is indebted to no other members. If the membership is an asset, the bankruptcy court may, of course, order him to make such application for sale. If this discloses debts to other members in excess of the value of the membership, his trustee should, and will, elect not to take the membership. If debts are disclosed of less amount than the value of the membership, the trustee may secure the surplus by settling these debts. If there are no such debts he may secure the entire proceeds.

It is, therefore, respectfully submitted that the decree of the District Court should be reversed.

HENRY S. ROBBINS,
Counsel for Petitioners.





IN THE

SUPREME COURT OF THE UNITED STATES,

IN VACATION AFTER THE
OCTOBER TERM, A. D. 1921.

BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Petitioners,

vs.

E. H. JOHNSON, Trustee in Bankruptcy of Wilson F. Henderson,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Question of Jurisdiction.

The opinion of the Circuit Court of Appeals says that "the record and undenied statements in open court show that at the time the bankruptcy proceedings were commenced * * * Henderson was a citizen of the State of Florida."

There is nothing in the record to support this statement. On the contrary, the verified creditors' petition to have Henderson adjudged a bankrupt (Rec., 6) expressly states that Henderson was a resident of Chicago, and if he had been a resident of the Florida district, the District Court for the Illinois district would have been without jurisdiction to adjudge him a bankrupt, and it would have been the duty of the Circuit Court of Appeals

of its own motion to have directed the dismissal, not only of the petition involved in this record, but the entire bankruptcy proceeding. Furthermore, that court was not warranted in accepting, in lieu of the plain statements of the record, "undenied statements made in open court" by respondent's counsel.

Jurisdiction in the District Court, therefore, could not be sustained within the exception in Section 23-b of the Bankruptcy Act, which permits suits by the trustee in the courts where the bankrupt might have brought them, had proceedings in bankruptcy not intervened.

The Circuit Court of Appeals did not itself rely upon this basis for jurisdiction; for it proceeded to uphold the jurisdiction of the District Court upon the ground that the Board of Trade and its co-petitioners here were not "adverse claimants" within the jurisdictional provisions of the Bankruptcy Act.

Under the Bankruptcy Act of 1867, suits by an assignee in bankruptcy "against any person claiming an adverse interest" and suits by such claimant against such trustee were included in the plenary jurisdiction of the Circuit and the District Courts. The present Bankruptcy Act (Section 23) conferred on the Circuit Courts a limited jurisdiction "of all controversies in law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees," but provided that, unless the proposed defendant consented, such suits *by the trustee* could only be brought in the courts where the bankrupt might have sued, if proceedings in bankruptcy had not been instituted, except suits under Section 60-b, 67-e and 70-e of the Bankruptcy Act, which sections—despite what the opinion of the court says—have not the slightest relation to the case at bar.

While this distinction between summary proceedings in nkruptcy—in which parties to the bankruptcy proceedgs are the only interested parties—and independent ntroversies between the trustee in bankruptcy on the e side and strangers to the bankruptcy proceedings on e other is expressed in somewhat different language in ese two bankruptcy statutes, the distinction between e two proceedings is identical under both statutes.

First National Bank v. *Title and Trust Company*, 198 U. S. 280-9.

The Circuit Court of Appeals has decided that neither e Board of Trade nor the co-petitioners (all of whom e strangers to the bankruptcy proceeding) are to be rerded as adverse claimants, although they claim, as does e trustee, what this court has decided to be property oject to taxation (*Anderson* v. *Duer*, Oct. Term, 1921.)

To reach this result that court confines adverse imants to those "who (1) have possession of the propy, claiming ownership thereof or a lien thereon, or (2) o deny owing any money claimed by the trustee."

There is no valid reason, and no authority, for thus iting the character of adverse claimants, or thereby luding your petitioners from that category. No reaexists for holding to be an adverse claimant one, who ppens to be the owner of property susceptible of possion, or one indebted to the bankrupt on a money dend and denying the same character to one who has or erts a right which relates—as here—to intangible perty.

An adverse claimant is anyone who claims adversely another some right which the law recognizes and will tect. Where—as here—a trustee seeks to defeat a ntract between a bankrupt and the Board of Trade,

which is a stranger to the bankruptcy proceedings, or where the trustee is attempting to defeat a right under a charter from a state claimed by such stranger to the proceeding, the latter is an adverse claimant, especially where the right claimed relates to or affects what this court has held to be valuable property.

Within the principle, as thus properly defined, the Board of Trade is an adverse claimant. Under its charter it has the right to suspend a member until all his debts to all other members are paid. This is but a part of its disciplinary power over its members. The Illinois courts have many time upheld, and many times refused to interfere with, the exercise of this disciplinary power.

The Board of Trade asserts, and the trustee denies, the continuance of this power *after* the institution of bankruptcy proceedings. On what theory can it be claimed that this did not present a controversy, and a substantial and *bona fide* controversy, between the trustee and a stranger to the bankruptcy proceeding, who is an adverse claimant within the meaning of the Bankruptcy Act?

Later in this brief it will be shown that this right to suspend continues after the institution of bankruptcy proceedings, and that the Circuit Court of Appeals erred in not so holding. But this is not the question here. As respects jurisdiction, the only question is whether the Board's claim of the right to discipline its members after bankruptcy proceedings are instituted is a substantial one. If it is, the District Court is without jurisdiction. And this question of jurisdiction may not be disposed of—as the Circuit Court of Appeals has attempted to dispose of it—by saying that the court is against this adverse claimant on the merits of its claim.

The Board of Trade is not the only claimant. The Trustee also made defendants to his petition the co-peti-

ners (members of the Board of Trade) who have unid claims against Lipsey & Company, Henderson's corration, and the petition prayed for, and the District urt granted, relief against these claimants.

All of them claim that, under the rules of the Board Trade, Henderson's membership could not be transred until their claims were paid or satisfactorily setd. Co-petitioners Bridge & Leonard also claimed the ht to have the Board of Trade suspend Henderson until psey & Company's debt to them was paid.

These debts of Lipsey & Company were valid liens upon membership for sums which in the aggregate far ceeded its value. For a lien often arises out of nere right to *withhold* property from the owner until pays a debt. Certain common law liens do not include power of sale. (25 Cyc., 662, 680, 19 Halsbury's Laws England 25.) The rules of the Board of Trade enabled se co-petitioners to prevent Henderson and his asns from realizing by a sale of the membership without t paying or settling co-petitioners' claims.

The Circuit Court of Appeals disposed of the question jurisdiction thus raised by deciding co-petitioners' ims to liens against them on the *merits*. We shall show er in this brief that that court was in error in so decid- (see pp. 8-13 of this brief). In disposing of pleas the jurisdiction, the question is, not whether the claims are on the right or wrong side of the controversy, only whether there is a real controversy.

As these co-petitioners claimed liens upon the membership of Henderson, this case is not distinguishable m *First National Bank* v. *Chicago Title & Trust Co.*, U. S. 280, in which case this court issued a certiorari, ersed this same Circuit Court of Appeals, and held t the District Court was without jurisdiction.

In that case the Storage Company claimed certain property as against the trustee in bankruptcy, because it had issued therefor certain warehouse receipts. Here the Board of Trade asserts the right to withhold the transfer of the membership to the trustee because of certain of its rules and its implied contracts with its members. In the First National Bank case the holders of the warehouse receipts claimed liens upon the property. In the case at bar your co-petitioners claim liens upon the membership. In both cases the claims of the corporations, as well as the claims of those asserting liens, were *bona fide* and substantial. In the *First National Bank case* this court decided not only that the Circuit Court of Appeals had erred upon the question of jurisdiction, but also that this question was of sufficient importance to warrant a certiorari. Why is not this also true in the present case? Certainly the particular question arising in the present case will recur much more frequently than would have the particular question in the *First National Bank case.*

The case of *Galbraith* v. *Vallely,* 256 U. S. 46, seems also to be a direct authority for the writ of certiorari in the present case.

The intent of Congress has been to make this court the final judge of questions respecting the jurisdiction of the Federal courts, and although this court has held (*Schweer* v. *Brown,* 195 U. S. 171) that the particular question of jurisdiction here raised is not within Section 5 of the Judiciary Act authorizing appeals directly to this court, the present record does squarely present the question, whether the Federal court had any jurisdiction of this particular controversy; and by reason of the case just cited your petitioners may present this question to this court only through the issuance of a certiorari.

It is true that, where the trustee is *in possession* of the property in controversy, he may maintain in the Court of Bankruptcy a plenary suit against strangers to the bankruptcy proceeding. But so far as this membership was susceptible of possession, it was in possession and control of the Board of Trade. The membership could not be transferred until the Board of Trade accepted the proposed transferee as a member, and for this reason the decree ordered—and it was necessary that it should order —the Board of Trade to transfer the membership to the trustee.

The Circuit Court of Appeals, therefore, properly ignored the contention of counsel for respondent—which will be renewed in this court—that the membership passed into the *constructive* possession of the trustee by reason of the adjudication in bankruptcy.

In *O'Dell* v. *Boyden*, 150 Fed. 731, which counsel cite in support of this contention, a member of the New York Stock Exchange became a bankrupt and under the order of the Bankruptcy Court requested the Exchange to sell his membership; and the Exchange sanctioned the transfer of the membership to one whom the Exchange accepted as a member, and the proceeds of such sale were held by officials of the Exchange awaiting distribution pursuant to its rules, which gave priority in such distribution to its own members. The Exchange itself made no claim to any of the money. The right of creditor-members to priority of distribution was conceded. The controversy related only to the residue of the proceeds after the payments to the Exchange members. After the sale a claimant appeared for this residue, and the only controversy was between the trustee and this claimant. Neither the Exchange nor its creditor members were in any sense adverse claimants. Before the appearance of this claimant the Exchange had, in fact,

accepted the position of agent or bailee for the trustee, and thus under *Bryan* v. *Bernheimer,* 181 U. S. 188, the Exchange was in no sense an adverse claimant. The validity of its rules were not questioned, and its position was entirely different from that of the Board of Trade in the case at bar.

II.

The Merits.

The Circuit Court of Appeals erred on the merits in two respects:

(1) It held that the right of the Board of Trade under its rules to suspend a member until his debts to other members were paid ceased upon the appointment of a trustee in bankruptcy—even as respects debts which had accrued *before* the bankruptcy proceedings—because such suspension "would merely destroy the sale value" of the membership, which "the District Court had the power to prevent."

(2) That court construed the rules to mean that when an application for transfer of a membership had been posted and no objection was filed *within ten days,* "the right to transfer becomes absolute without action by the Board," and that upon being adjudicated a bankrupt "Henderson ceased to be a member, and was of course not thereafter subject to discipline by the Board," all his rights having passed to the trustee. In this the Circuit Court of Appeals affirmed the expressed finding of the decree of the District Court. (Rec., 40.)

One fundamental error here is the assertion that upon an adjudication in bankruptcy the title to the membership *ipso facto* passes to the trustee. This is in direct conflict with

Sparhawk v. *Yerkes,* 142 U. S. 1,

where this court held that the right of a trustee in bankruptcy of an exchange member, whose membership was incumbered by a rule of the exchange providing for his suspension until his debts to other members were paid—was only the right to *elect* within a reasonable time whether to take the membership or not, and that if such trustee should elect not to take, the membership remains the property of the bankrupt—thus placing the trustee, as respects a membership on an exchange, in the same position that he occupies respecting an unexpired leasehold.

This theory that the trustee has only the power to elect is plainly the proper and practical one; for it permits the member to continue to earn his living after bankruptcy by acting as a broker or agent in exchange transactions, until and unless the Bankruptcy court, to avoid incumbering the membership with new debts to other members, shall enjoin him from further trading.

If the membership is already incumbered by debts to members beyond its value, so that the trustee should elect not to take it and pay the dues upon it, the bankrupt member may continue to earn a living upon the Exchange so long as his Exchange creditors indulge him, and this they frequently will do as the best way to enable him to ultimately pay or compromise his debts to them, and thereby become again a member in good standing as was the case in *Sparhawk* v. *Yerkes*.

A rule of the Board of Trade provides (Rec., 17):

> "When any member of this Association has been duly convicted of failure to comply with the terms of any business obligation * * * he shall be suspended from all privileges of the Board of Trade * * * until all his outstanding obligations to members of the said Board of Trade shall have been settled, when he may * * * be reinstated."

Another rule provides (Rec., 18) that before a member shall be suspended he shall have notice and a copy of the charge upon which suspension is sought.

In the *Sparhawk case*, as well as in *Page* v. *Edmunds*, 187 U. S. 601, this court has upheld, as against a trustee in bankruptcy, exchange rules which automatically suspend an insolvent member and provide that his debts to other members should be first paid; and no distinction is apparent between such a rule and one which, like the one at bar, makes such suspension discretionary with the board of directors of the Exchange.

As there is no rule of the Exchange fixing a time limit, within which such charge shall be preferred or the suspension ordered—the rule being applicable to "any member,"—one is subject to suspension under this rule so long as he remains a member. If a proceeding to suspend is commenced before the Board of Directors has sanctioned a sale of the membership, the membership becomes impaired under Rule X, hereafter mentioned, and the Board of Directors may not sanction the sale until the proceeding to suspend is disposed of, and, if the member is suspended, until he has adjusted his debts to other members.

The Circuit Court of Appeals avoids this inevitable conclusion by holding (1) that Henderson had "ceased to be a member" before Bridge & Leonard filed their petition to suspend him, and "was of course not thereafter subject to discipline by the Board"; and (2) that the District Court had "power to prevent" a suspension under this rule because such suspension "would merely destroy the sale value" of the membership.

This is but another way of saying that the trustee takes the membership free from conditions which clog it as respects the member—a proposition which is at vari-

ance with several decisions of this court, which recognize and uphold the restrictions upon a membership which the rules of the exchange impose.

Hyde v. *Woods*, 94 U. S. 525,

where this court, in upholding a rule giving priority to exchange creditors, said:

> "A seat in this board is not a matter of absolute purchase. Though we have said it is property, it is incumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of Article 15, neither when Fenn bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come." And

Sparhawk v. *Yerkes*, 142 U. S. 1,

where this court again held a seat in a stock exchange to be "property, not absolute and unqualified, but limited and restricted by the rules of the association."

The Transfer of a Membership. Rule X (Rec., 10) provides (Section 1) that one may become a member only after ten days' notice of such application has been posted on the bulletin of the Exchange, and upon the approval of at least ten of the eighteen directors, and that

> "Every member shall be entitled to transfer his membership when he * * * has against him no outstanding * * * claims or contracts held by members of this Association, and said membership is not in any way impaired or forfeited * * * *to any person eligible to membership who may be approved for membership by the Board of Directors,* after due notice by posting, as provided in Section 1 of this rule * * * Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the Exchange for *at least* ten days, when, if no objection is made, it shall be assumed the member has no outstanding claims against him."

Thus as a prerequisite to the transfer of a membership, a member desiring to transfer his membership must produce a person willing to purchase, and the name of this person must be posted on the bulletin board of the Exchange for ten days, and thereafter such applicant must be approved for membership by the Board of Directors. The Board of Directors may not, under this rule, approve the transfer, if the membership is impaired by the pendency of, or suspension in, disciplinary proceedings.

What operates to transfer the membership is the action of the Board of Directors in accepting the new member.

The Circuit Court of Appeals, therefore, misconstrued this rule in holding, as it did, that by reason of the failure of creditors to object within ten days "the right of transfer becomes absolute without action by the Board," and that thereafter the selling member ceases to be a member or subject to discipline.

This membership rule is also construed by the Circuit Court of Appeals to mean that objections to the transfer of the membership must be presented *within ten days.* The rule will bear no such construction. It requires that the application for transfer shall be posted for "*at least* ten days *when*, if no objection is made, it shall be assumed the member has no oustanding claims against him." This merely provides that there must be a posting for at least ten days before the Board of Directors may approve the transfer. The application must be posted on the bulletin and remain there at least ten days, but the Board of Directors, by not then acting, may prolong the period for posting. It remains posted there until it is acted upon by the Board of Directors. Any member, having an outstanding claim against the member may object to the transfer at any time while the application is thus posted; that is, before the Board of Directors shall approve

the transfer. The "when" in the last clause refers not to ten days, but to the period of posting. This is necessarily so, because when the Board of Directors acts it must first find that the selling member *has*—that is, at that time—against him no outstanding claim held by a member.

There is nothing in the rules of this Exchange to embarrass a trustee of a bankrupt member in the administration of the estate. While the rules do not provide that Exchange creditors of a member may *compel* him to sell his membership to pay them, they do contemplate that a member may request and secure the sale of his membership, if he pays his debts to other members, or is indebted to no other members. The Bankruptcy Court may, of course, order him to make such application for sale. If this discloses debts to other members in excess of the value of the membership, his trustee should, and will, elect not to take the membership. If debts are disclosed of less amount than the value of the membership, the trustee may secure the surplus by settling these debts. If there are no such debts he may secure the entire proceeds.

It is, therefore, respectfully submitted that the writ of certiorari should issue because (1) the District Court was without jurisdiction, and (2) without such writ your petitioners will be deprived of the benefit of the decisions of this court.

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Counsel for Petitioners.